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The Indian Child Welfare Act of 1978 and the Missed Opportunity to Apply the Act in Guardianships

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THE INDIAN CHILD WELFARE ACT OF 1978 AND THE MISSED OPPORTUNITY TO APPLY THE ACT IN GUARDIANSHIPS

I. INTRODUCTION

State courts have had over two decades to mold the Indian Child Welfare Act of 1978 ("ICWA" or "the Act")[1] into a mechanism for protecting Indian heritage while simultaneously providing the ideal nurturing conditions for Indian children who are the subjects of custodial proceedings involving a non-parent.[2] Although there are no typical ICWA cases, each case poses common procedural requirements, and the Act, like any other federal statute, is best served by uniform compliance.[3] Even so, judges, attorneys and caseworkers are unfamiliar with or resistant to ICWA, therefore necessitating critical consideration of the purpose of the Act.[4] This is especially true because of the greater frequency of ICWA cases in recent years.[5] Since the statute was enacted, well over 250 court decisions have shaped the area of Indian child law.[6] Thus, very clearly, a need exists for a better understanding of ICWA and the intricacies involved in its function.

Too often, courts struggle with the Act's application because it is not clear as to the circumstances that require its use.[7] One situation that has yet to be addressed in any major court decision and which poses potentially damaging

1. 25 U.S.C. §§ 1901-63 (1994).

2. *See generally* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989); *see also In re* Shawboose, 438 N.W.2d 272 (Mich. Ct. App. 1989); *In re* Adoption of S.S., 622 N.E.2d 832 (Ill. App. Ct. 1993).

3. Helen Ann Yunis & Katherine Scotta, *The Indian Child Welfare Act: A Case Study*, 2 MICH. CHILD WELFARE J. 14, 14 (1998).

4. *Id*.

5. B.J. Jones, *The Indian Child Welfare Act – The need for a separate law*, American Bar Association (Aug. 29, 2000), *available at* http://www.abanet.org/genpractice/compleat/f95child.html (last visited Aug. 29, 2000)

6. *Id*.

7. Peter K. Wahl, *Little Power to Help Brenda? A Defense of the Indian Child Welfare Act and Its Continued Implementation in Minnesota*, 26 WM. MITCHELL L. REV. 811, 836 (2000). Wahl suggests that "officials do not follow ICWA as strictly as they should," "continued disdain for protecting Indian culture appears prevalent among those expected to be most instrumental in preservation" and "there is a lack of knowledge regarding ICWA and the need for cultural preservation." Wahl also refers to a January 1992 study in Hennepin County, Minnesota, which makes clear, he contends, that "greater attention to ICWA is necessary in many areas in order to comply with federal law." *Id.*

effects on Indian tribes, Indian children and Indian culture as such is the creation and termination of guardianships. Although many state statutes require the presiding judge to routinely inquire as to whether a child in a custody proceeding is an Indian,[8] they do not indicate that guardianships are considered child custody proceedings that require the same inquiry into Indian tribe membership.[9] As a result, a situation is created where a major mistake can be made in overlooking ICWA's applicability.

The Act clearly applies to guardianship proceedings where the parent or Indian custodian cannot have the child returned upon demand, even if parental rights have not been terminated.[10] Reasons for this oversight involve a combination of ignorance and disdain for federal law.[11] Because state statutory schemes, court rules and case law normally do not include a guardianship proceeding as a child custody proceeding,[12] it becomes easy for a state judge to simply conclude that ICWA does not apply to Indian children in guardianships. Furthermore, many litigators and judges assume ICWA only applies when the state, and not a private party, is seeking an out-of-home placement. Moreover, the Act was intended to govern not only state and county social services programs, but judicial practices as well; state regulations are not directed at courts, thus leaving it to judges or the parties to invoke ICWA themselves.

The purpose of this legislative Note is to recognize the tendency of courts to make this mistake and to encourage the correction of the oversight in order to remain consistent with the congressional intent of preserving Indian heritage in determining the living arrangements that would be in the best interests of the Indian child. Part II is an examination of the policies that drove Congress to enact ICWA. Critical attention is given to the special standard adopted for considering the best interests of the Indian child, the constitutionality of the legislation and the Act's success in achieving Congress's purpose. Part II also provides the backdrop for explaining the Act's justification and application to child custody proceedings.

Part III is a discussion of the proceedings which are covered and which are not covered by the Act and the importance of involving tribal courts when possible. This necessitates mentioning three critical aspects of the Act: jurisdictional requirements, the tribal notice requirement and placement

8. Interview with Hon. Michael Anderegg, Michigan Tribal Court (Oct. 20, 2000).

9. 25 U.S.C. § 1903.

10. *Id*. Conversely, the implication is that if a guardianship exists where the parent or Indian custodian has relinquished the child but can have her returned upon request, then ICWA is inapplicable.

11. *See* Yunis & Scotta, *supra* note 3, at 14.

12. BLACK'S LAW DICTIONARY 390 (7th ed. 1999) (defining a "custody hearing" as "[a] judicial examination of the facts relating to parental custody in a divorce or separation proceeding").

preferences of Indian children. Part IV discusses the special situation of ICWA guardianships, explains the potential for misconstruing this aspect of the federal legislation and provides illustrations of the rare cases where courts properly identified ICWA guardianships.

Part V is an analysis of whether courts are correctly identifying ICWA guardianships and a study of state statutes and court rules which aid in ICWA litigation. It also includes an analysis of other aspects of ICWA guardianships, including the balance of rights between the guardian and non-custodial parent(s), applying ICWA when a guardianship is ambiguously defined by state law and the effects of failing to apply ICWA to guardianships. Finally, in Part VI, a conclusion is drawn that courts and legislatures must become more assertive in developing explicit laws pertaining to ICWA guardianships to avoid frustrating the principles that drove Congress to pass the legislation.

II. THE HISTORICAL BACKGROUND OF ICWA

A. The Policies Framed in ICWA

It is essential to understand the motivation behind ICWA to become familiar with the provisions of the Act, especially those that appear to be unclear. ICWA was enacted in 1978 to "protect the best interests of the Indian children and to promote the stability and security of Indian tribes and families . . . ."[13] It was a part of a congressional "restitution policy"[14] instituted in the 1970s in response to Western civilization's undermining of Native American political, economic and cultural practices over the previous hundred years.[15] Indian law scholars explain that

> [f]ederal Indian policy has always dealt, at its nub, with the question of whether and to what extent the United States should permit, encourage, or force the assimilation of American Indians into the majority society . . . . [A] prominent force behind assimilationist policy has been the desire for Indian land and resources. But it is not that simple. Many non-Indians, especially those unfamiliar with Indian people and Indian reservations, see life on the reservations as undesirable, as a blot on our national character. To them, Indians themselves would benefit by leaving tribal life behind and sharing in the benefits offered by the majority society.[16]

13. 25 U.S.C. § 1902.

14. Alissa M. Wilson, *The Best Interests of Children in the Cultural Context of the Indian Child Welfare Act in* In Re S.S. and R.S., 28 LOY. U. CHI. L.J. 839, 845 (1997).

15. *Id.* at 844-45.

16. DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW—CASES AND MATERIALS 26 (3d ed. 1998).

Ultimately, Congress determined that Native American traditions, values and customs were more important to preserve than was the assimilation of Native Americans into the dominant[17] Anglo-Saxon lifestyle.[18]

More specifically, this legislation was a response to the high rate of removal of Indian children from Indian homes and placement into non-Indian foster and adoptive homes and institutions.[19] Because of cultural differences and biases and the dominating authority of state courts, Indian children were too easily removed from their Indian families and tribes altogether. A survey of large Indian populations, conducted by the Association of American Indian Affairs, revealed that twenty-five to thirty-five percent of all Indian children were removed from their homes and placed into foster homes, adoptive homes or institutions.[20] Eighty-five percent of those children placed in foster care were placed in non-Indian homes.[21] In response to these concerns, Congress, through ICWA, established "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . . ."[22]

17. Three decades after the introduction of restitution policy, one could quite easily argue that America is a much more diverse country nowadays and is much more accommodating to all cultures within its borders. Thus, the use of the word "dominant" has lost a bit of its stinging resonance in this context.

18. B.J. JONES, THE INDIAN CHILD WELFARE ACT HANDBOOK—A LEGAL GUIDE TO CUSTODY AND ADOPTION OF NATIVE AMERICAN CHILDREN 4 (1995) [hereinafter HANDBOOK].

19. 25 U.S.C. § 1901(4). *See, e.g.*, Indian Self-Determination Act, 25 U.S.C. § 450 *et seq.* (1978).

20. David Woodward, *The Rights of Reservation Parents and Children: Cultural Survival or the Final Termination?*, *in* NATIVE AMERICAN CULTURAL AND RELIGIOUS FREEDOMS 101-02 (John R. Wunder ed., 1999) (citing 1 ASSOCIATION ON AMERICA INDIAN AFFAIRS, INC., INDIAN FAMILY DEFENSE 1 (1974)).

21. Woodward, *supra* note 20, at 102 (citing 1 ASSOCIATION ON AMERICA INDIAN AFFAIRS, INC., INDIAN FAMILY DEFENSE 2 (1974)). Woodward provides a vivid example of the unethical, yet typical, pre-ICWA practices:

> On January 9, 1973, Delphine Foote, a 24-year-old mother from the Standing Rock Sioux Reservation, left her infant son, Christopher, with the South Dakota Welfare Department and her signature on a form which stated explicitly that relinquishment of custody was strictly temporary. That statement was reinforced by the oral understanding between Ms. Foote and her assigned social worker that Christopher would be immediately returned upon demand. The mother subsequently made that demand only to have the Department institute a neglect and dependency proceeding against her in an attempt to terminate her parental rights to Christopher and thereby facilitate his adoption by the non-Indian foster parents with whom he had been placed.

Id. at 102 (citing *Habeas Corpus Hearing, Mobridge, S.D.* (Cir. Ct. 6th Jud. Dist., Apr. 1974)).

22. 25 U.S.C. § 1902. "Congress has always felt a traditional interest in Indian affairs deriving from the authority given it in the Constitution 'to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.'" WILCOMB E. WASHBURN,

One issue that arises is whether the best interests of the child is subservient to the best interest of the tribe. Congress has identified both as vital,[23] but problems arise when these two interests conflict. The question, then, is whether one concern supercedes the other. The text of the Act gives no guidance. In these situations, it is probably most logical to apply a balancing test. For instance, consider a situation where a non-Indian guardian has cared for an Indian child for an extended period of time. Both of the biological parents have been nonexistent in the child's life for years. But one parent who is an alcoholic and has a history of child abuse and neglect initiates an action to regain possession of the child. The court must balance the two purposes of the Act: is it more important to allow the child to develop within the Indian community despite the risk posed by the abusive parent, or should the child's Indian heritage be ignored in order to ensure nurturing within a caring home? These decisions can go either way depending on the factual context of the case.

B. The Best Interests of the Indian Child

The traditional theory of the best interests of the child emphasizes that the psychological bonding between the child and adult is a very important consideration in determining a child's best interest.[24] This notion of the best interests of the child is threaded into practically all child custody statutes.[25] However, the concept of best interests in ICWA requires looking not only at the child's psychological bond with a parent, custodian or guardian, but also considering "the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining [its] children in its society."[26] ICWA expresses Congress's belief that Native Americans have such unique child-

RED MAN'S LAND/WHITE MAN'S LAW: THE PAST AND PRESENT STATUS OF THE AMERICAN INDIAN 214 (2d ed. 1995) (citing U.S. CONST. art. I, § 8, cl. 3).

23. 25 U.S.C. § 1902.

24. *See, e.g.*, *In re* Kassandra H. v. Patricia F., 75 Cal. Rptr. 2d 668 (Cal. Ct. App. 1998).

25. *See, e.g.*, MINN. STAT. § 518.17 (1994) ("'The best interests of the child' means all relevant factors to be considered and evaluated by the court including . . . the intimacy of the relationship between each parent and the child . . ." and "the interaction and interrelationship of the child with a parent or parents, siblings, and any other person who may significantly affect the child's best interest . . . ."); MONT. CODE ANN. § 41-3-102 (2000) ("'Best interests of the child' means the physical, mental, psychological conditions and needs of the child and any other factor considered by the court to be relevant to the child."); W. V. CODE § 48-11-102 (2000) ("The primary objective of this article is to serve the child's best interest, by facilitating [*inter alia*] [c]ontinuity of existing parent-child attachments . . . ."); and MICH. COMP. LAWS § 722.23 (2000) ("'[B]est interests of the child' means . . . [*inter alia*] [t]he love, affection, and other emotional ties existing between the parties involved and the child . . ." and "[t]he capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.").

26. Hon. Maurice Portley, *The Indian Child Welfare Act: A Primer*, 36 ARIZ. ATT'Y 24, 25 (2000) (quoting H.R. REP. NO. 1386 (1978)).

raising practices that state statutes are inadequate instruments for determining the best interests of an Indian child.[27] The widespread removal of Native American children from their families had detrimental effects on Native American tribes, which depended upon the unity of their communities and traditions for their survival.[28] Much weight must be given to the value of allowing the child to develop within the Indian community. Congress's theory is that the modified best interest standard can be utilized to arrive at desirable outcomes.[29]

Native Americans rely heavily on survival of the "whole" to which they belong, which includes not only their immediate families, but also the communal tribe, the land on which they live and the wildlife that surrounds them.[30] This style of living is impressed upon Indian children from birth through child-rearing traditions such as oral storytelling,[31] which is a means of teaching rules on living and how to treat other people and animals.[32] Additionally, Indian children often have responsibilities that extend beyond

27. HANDBOOK, *supra* note 18, at 5.

28. *Id*.

29. These outcomes include a reduction in the rate of Indian children placed outside the tribal home and an increase in tribal participation in the judicial process. The Supreme Court decision in *Palmore v. Sidoti* also brings about important considerations with regard to Indian children's best interests. 466 U.S. 429 (1984). There, the Court ruled that courts may not consider race as the sole factor in determining the best interests. *Id*. at 434. The scope of this landmark decision is unclear. Perhaps the decision extends to ethnicity. Further, perhaps race or ethnicity may be considered as one factor among many. Two points should be noted: First, the party asserting that race should be considered in *Palmore* may have been concerned that suffering would be sure to come in the future. That is, because the child was not part of a racially aligned family, that child might experience emotional and psychological problems in the future. With its decision, the Court did not accept this line of reasoning, which seems to contravene the special standard for determining an Indian child's best interest. *But see* text accompanying notes 35-39. Second, the *Palmore* decision suggests that child custody considerations should be hierarchically arranged—that is, maybe the *Palmore* Court sacrificed the child's best interest because preventing racial discrimination was a higher constitutional priority for the Court. If this is the case, maybe ICWA should be construed as a hierarchical arrangement between the Indian child's interest and the preservation of Indian heritage—the Court has always given special protection to the Indian tribe, so it may be more of a priority than the Indian child's best interests. *See* text accompanying notes 35-39.

30. HANDBOOK, *supra* note 18, at 5 (citing JOHN F. BRYDE, MODERN INDIAN PSYCHOLOGY (1971)).

31. *Id.* (citing MICHAEL J. CADUTO & JOSEPH BRUCHAC, KEEPERS OF THE ANIMALS: NATIVE AMERICAN STORIES AND WILDLIFE ACTIVITIES FOR CHILDREN (1991)).

32. *Id.* (citing THOMAS MAILS, FOOLS CROW: WISDOM AND POWER (1991)). Oral storytelling is also a tradition in many other cultures. However, when comparing Native American oral storytelling traditions to that of the Anglo-Saxon society, it is apparent that storytelling is a much more prevalent and deliberate tool for child rearing in the Native American culture.

their nuclear family.[33] This is considerably different from the formal education process and practices of the typical immediate family in the Anglo-Saxon culture. These fundamental differences in values and methods of child-rearing provided Congress with the justification to develop a different standard for determining the placement of Indian children within or outside the Indian home.[34]

C. Challenges to the Constitutionality of ICWA

The different best interests standard, as well as other provisions of ICWA, has repeatedly withstood constitutional challenges.[35] The United States Supreme Court has recognized that there is a special relationship between the federal government and Indian tribes. The government's responsibilities have been characterized as being similar to a guardian in a trust relationship.[36] Congress has an enumerated power to regulate commerce with Indian tribes.[37] Courts recognized even before the enactment of ICWA that tribal courts had jurisdiction in domestic relations problems, including marriages, adoptions, divorces, property distributions and determination of children's rights, so long as the parties resided on the reservation.[38] In the past, however, state law usually applied to Indians in these same cases if they ventured off the reservation; they were no longer under the jurisdiction of the reservation tribal courts.[39] Today, this is not the case as Congress has dictated a broader scope for tribal court jurisdiction.

33. *Id.* (citing ELLA CARA DELORIA, WATERLILY (1988) (detailing a Dakota woman's life from birth to old age)).

34. *See* HANDBOOK, *supra* note 18, at 6. *But see* David Null, In re Junious M.: *The California Application of the Indian Child Welfare Act*, 8 J. JUV. L. 74, 86 (1984) ("The . . . Act was promulgated for all the right reasons. The Act is flawed, however, because it failed to consider that many children are, in fact, of multiracial backgrounds with little identity or heritage as Indians to protect.").

35. *See, e.g.*, *In re* Appeal of Pima County Juvenile Action S-903, 635 P.2d 187 (Ariz. Ct. App. 1981), *cert. denied*, 455 U.S. 1007 (1982). Also note that the *Palmore* Court did not address ICWA, so even after 1984, ICWA has remained intact. *See supra* note 29.

36. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); United States v. Mitchell, 463 U.S. 206 (1980).

37. U.S. CONST. art. I, § 8, cl. 3.

38. HANDBOOK, *supra* note 18, at 7 (citing Fisher v. District Court, 424 U.S. 382 (1976) (discussing exclusive authority to grant on-reservation adoption)); NoFire v. United States, 164 U.S. 657 (1897) (discussing authority to grant marriage license); Conroy v. Conroy, 575 F.2d 175 (8th Cir. 1978) (discussing authority to divide marital property); Carney v. Chapman, 247 U.S. 102 (1918); Heart v. Ellenbecker, 689 F. Supp. 989 (D.S.D. 1988).

39. *Id.* (citing Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973)).

D. Achieving Its Purpose

ICWA has alleviated some of the problems Congress intended to address with its enactment. Its mere existence naturally forces judicial recognition of Native American concerns. The rapidly increasing number of ICWA cases is evidence that courts have involved tribes, tribal courts and other Indian parties more frequently than before enactment. Consequently, the rate of removal from Indian homes has been reduced over the last two decades.[40] However, removal of Indian children from their Indian homes seems to be disproportionately high compared with removal of non-Indian children from their ethnic or racial homes.[41] Nevertheless, ICWA appears to be legislation that has the ultimate capability of ensuring the survival of Indian tribes, while providing a proper environment for the nurturing of Indian children, at least in most cases. The key to achieving this end is providing courts with awareness of the broad scope of the Act's application. As with any statute, there exists a problem interpreting Congress's intent. Hence, educating courts on situations that require the applicability of ICWA becomes imperative to promote uniformity.

The two-fold purpose of the Act is "to protect the best interests of Indian children and promote the stability and security of Indian tribes and families . . . ."[42] These motivations for the legislation were based on congressional findings and must be considered while interpreting every provision in the Act to determine how courts should apply it.[43]

III. APPLICATION OF ICWA: HOW DOES IT WORK?

An analysis of any aspect of ICWA requires an understanding of how the Act operates to achieve its stated objectives. Before delving into the guardianship issues, it is essential to discuss the scope and jurisdictional underpinnings of the Act. Generally, these underpinnings are geared toward promoting active Indian party and tribal court participation. Nevertheless, these legitimate means of carrying out the objectives of Congress do not entirely eliminate the tendency of overwhelming placement of Indian children in non-Indian homes by state courts.

40. *See* Wahl, *supra* note 7, at 836.

41. *See id.* at 836 n.151. Wahl points out, for example, that "Indian children in Minnesota continue to be removed from their homes ten times more frequently than Caucasian children." *Id.* at 836. Similarly, "Indian children represent less than one percent of the children in Minnesota, but comprise nearly twelve percent of the state's out-of-home placements." *Id.*

42. 25 U.S.C. § 1902; *see also supra* note 13 and accompanying text.

43. Wilson, *supra* note 14, at 847-48 n.69.

A. Distinguishing Proceedings Covered and Not Covered by ICWA

The Act only applies to "child custody proceedings." It defines four types: (1) "foster care placement" which means "any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated"; (2) "termination of parental rights" which means "any action resulting in the termination of the parent-child relationship"; (3) "pre-adoptive placement" which means "the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement"; and (4) "adoptive placement" which means the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption."[44]

Once the court determines whether the proceeding is a child custody proceeding, the next question to answer is whether the child is an Indian.[45] As defined by the Act, an "Indian child" is "any unmarried person who is either a member of an Indian tribe or is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."[46] The tribe must be federally recognized for a child to be eligible.[47] Typically, courts leave it to the relevant tribe to declare that the child is either a member or eligible for membership in the tribe.[48] Any decision made by the tribe pertaining to membership or eligibility is given full faith and credit.[49] Once the child is deemed an Indian and the proceeding falls within ICWA, the court must conclude that ICWA applies.

The latitude given tribes to make membership and eligibility decisions is clearly a deliberate attempt by Congress to increase tribal participation, and undoubtedly an intention to decrease the removal of children from Native American tribes.[50] It is not an objective practice by any means. These decisions are usually based on the composition of Indian blood in the individual, and the blood requirements can vary greatly from tribe to tribe.[51] If a proceeding reaches this stage, where the tribe must determine membership or

44. 25 U.S.C. § 1903(1).

45. Portley, *supra* note 26, at 25. *See also generally*, HANDBOOK, *supra* note 18.

46. 25 U.S.C. § 1903(4).

47. The Secretary of Interior publishes annually a list of Indian tribes eligible for federal services and programs. It is rare to be deemed an eligible Indian tribe, but not be recognized on the list. *See, e.g.*, Interest of C.H., 510 N.W.2d 119 (S.D. 1993).

48. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). This means a state court is pre-empted from determining membership.

49. 25 U.S.C. § 1911(d).

50. Wahl, *supra* note 7, at 811-32.

51. *Id.* at 831-32.

eligibility, in theory, state courts have no discretion as to whether the Act applies; the decision is left to the tribe and hinges on whether the tribe finds that the child is an Indian.[52]

However, even when a child is deemed an Indian, there are instances where the proceeding is not covered by ICWA. The Act does not apply to custody disputes between the two natural parents.[53] Another important type of proceeding not covered under ICWA is delinquency placements. These are placement proceedings involving "act[s] which, if committed by an adult would be deemed a crime . . . ."[54]

A third exception to ICWA application is a judicially created minority position that is inconsistent with the United States Supreme Court holding in *Mississippi Band of Choctaw Indians v. Holyfield*, the most famous ICWA case since the Act's inception.[55] In *Holyfield*, the United States Supreme Court ruled that the state court did not have jurisdiction over a child custody proceeding involving a reservation-domiciled Native American couple who placed their twins with a non-Native American family residing off the reservation for adoption.[56] This reversed the Mississippi Supreme Court's holding that ICWA did not apply in the adoption case because the Indian children had never resided with a Native American family and were not domiciled on the reservation. The United States Supreme Court sent a strong message to state courts that, even where parents voluntarily give up their children, ICWA can still apply. Thus, in *Holyfield*, the Choctaw Tribe had the right to be put on notice of the action.[57] Furthermore, the tribal court had the right to exercise exclusive jurisdiction.[58] The Court reasoned that it was not a question of outcome, but rather a question of who should decide the outcome.[59] This rationale suggests that tribal court involvement is of utmost importance. In spite of the Supreme Court's ruling, state court decisions in Washington,[60]

52. Portley, *supra* note 26, at 25.

53. *In re* Sengstock, 477 N.W.2d 717 (S.D. 1989); Malatarre v. Malatarre, 293 N.W.2d 139 (N.D. 1980); *In re* Baisley, 749 P.2d 446 (Colo. Ct. App. 1987).

54. 25 U.S.C. 1903(1). *See, e.g.*, T.D.C, 748 P.2d 201, 203 (Utah Ct. App. 1988) (rejecting application of ICWA to placement of an Indian child for the commission of criminal conduct even though conduct was not serious under 42 U.S.C. § 5603(14) (1994)). However, note that "[t]here are several exceptions to this general rule, many of which are discussed in the guidelines enacted by the Department of Interior to guide state courts in the implementation of ICWA." HANDBOOK, *supra* note 18, at 14. *See* Department of Interior, Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 26, 1979).

55. 490 U.S. 30 (1989).

56. *Id*. at 40-41.

57. *Id.* at 53-54.

58. *Id*.

59. *Id*. at 53.

60. *In re* Crews, 825 P.2d 305 (Wash. 1992).

Oklahoma,[61] Alabama[62] and Louisiana[63] have held that this exception still exists. While some of these courts made attempts at distinguishing *Holyfield*, these decisions reflect ignorance of or, perhaps more accurately, disdain for federal law.[64]

Finally, most importantly as it relates to guardianships, a fourth proceeding not covered by ICWA is placement of a child where the parent can regain custody of the child upon demand.[65] The definition of "foster care placement" is limited. The only kind of guardianship covered by the Act is one where the child cannot be returned upon demand; it is a subset of foster care placements.[66] If the parent can regain possession of the child upon demand, then ICWA is inapplicable.[67] Situations where the parent can demand the child be returned are often voluntary. This voluntary parental right can be revoked rather easily. This voluntary placement occurs frequently due to the educational and religious needs of the child.[68] It should not be confused with the voluntary placement for purposes of an adoption, which ICWA clearly governs.[69]

61. *In re* S.C., 833 P.2d 1249 (Okla. 1992).

62. S.A. v. E.J.P., 571 So. 2d 1187 (Ala. Civ. App. 1990).

63. Barbry v. Dauzat, 576 So. 2d 1013 (La. Ct. App. 1991).

64. *See* C.E.H. v. L.M.W., 837 S.W.2d 947 (Mo. Ct. App. 1992). Jones points out that the appeals court "also suggested in rather strong dicta that the existing family exception is doctrinally correct, although the court there went on to apply the act." HANDBOOK, *supra* note 18, at 25 n.26. *See supra* text accompanying notes 4, 11.

65. 25 U.S.C. § 1903(1)(i).

66. *Id*.

67. *Id*. This is implied from the text of the Act: foster care placement means "any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator *where the parent or Indian custodian cannot have the child returned upon demand*, but where parental rights have not been terminated." *Id.* (emphasis added).

68. Jones notes:

> One reason there has been a high incidence of "voluntary" placements of Indian children for education purposes has been the failure of the Bureau of Indian Affairs to construct schools that are in close proximity to many Indian population bases. In the 1984 Oversight Hearings on the Indian Child Welfare Act, the Association on American Indian Affairs cited BIA statistics showing that almost one out of every two Indian students in the BIA education system had to be placed at a boarding school because of the absence of local day schools. This, as Congress noted at Title IV of ICWA, 25 U.S.C. § 1961(a), contributed to the displacement problems that ICWA was enacted to address. This problem has been somewhat alleviated by new standards for BIA schools. See 25 U.S.C. § 2001e, which stresses the need for local day schools.

HANDBOOK, *supra* note 18, at 24 n.13.

69. *See* 25 U.S.C. § 1913(a). *See also* HANDBOOK, *supra* note 18, at 24 n.14:

> The Department of Interior has promulgated recent amendments to 25 C.F.R. § 23.1 *et seq.*, in which the department defines "child custody proceeding" to also include "other tribal placements made in accordance with the placement preferences of the Act,

B. Jurisdiction

Jurisdiction is at the very heart of ICWA.[70] Congress intended to give tribal courts jurisdiction whenever possible because of their superior knowledge of Indian child-rearing practices, traditions and customs.[71] It falls squarely in line with the purposes of the Act: to preserve Indian heritage and to determine the child's best interests using the unique standard.[72] Tribal courts have exclusive jurisdiction over "any custody proceeding involving an Indian child who resides or is domiciled[73] within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law."[74] They also have exclusive jurisdiction "[w]here an Indian child is a ward of a tribal court . . . notwithstanding the residence or domicile of the child."[75] When the tribal court has exclusive jurisdiction, the state court is entirely removed from the case and cannot exercise any decision-making authority.

If the Indian child is not domiciled within an Indian reservation or is not a ward of the tribal court, there is still a presumption of tribal jurisdiction.[76] A case should be transferred to the tribal court unless there has been an express rejection of jurisdiction by the tribal court, an objection by either parent to the transfer or good cause is shown not to make the transfer.[77] Furthermore, the tribe can intervene at any time in the proceeding to protect its interests.[78]

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including the temporary or permanent placement of an Indian child in accordance with tribal children's codes and local tribal customs or traditions." 59 Fed. Reg. 2,257 (January 13, 1994). The import of this amendment is unclear.

Id.

70. Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 36 (1989).

71. HANDBOOK, *supra* note 18, at 29.

72. *See supra* notes 13, 42 and accompanying text.

73. The *Holyfield* Court established that a child's domicile is the same as his or her parents' and an illegitimate child's domicile is the same as his or her mother's. *Holyfield*, 490 U.S. at 48.

74. 25 U.S.C. § 1911(a).

75. *Id*.

76. *Holyfield*, 490 U.S. at 36 (interpreting 25 U.S.C. § 1911).

77. *In re* A.P., 961 P.2d 706, 712 (Kan. Ct. App. 1998).

ICWA does not define "good cause." Courts have followed the criteria adopted by the Bureau of Indian Affairs. Good cause exists (1) if the Indian child's tribe does not have a tribal court as defined by the act; (2) if the proceeding was at an advanced stage when the petition to transfer was filed and the petitioner did not file promptly after receiving notice of the hearing; (3) if the Indian child is older than 12 years of age and objects to the transfer; (4) if the tribal court would be an inconvenient forum to the parties or the witnesses; and (5) if the parents of a child older than five years of age are not available and the child has had little or no contact with the child's tribe or its members.

Id.; *see* 25 U.S.C. § 1911(b); 44 Fed. Reg. 67,584 (Nov. 26, 1979).

78. 25 U.S.C. § 1911(c).

C. The Notice Requirement

There are a number of procedural mandates to follow once it is determined that ICWA governs. Depending on whether the proceeding is voluntary or involuntary, certain provisions require different procedures. All requirements are intended to establish a high level of protection for parents and tribes from states' abilities to remove a child from the home and from the Indian tribe.

One such mandate is the notice requirement for involuntary proceedings. Congress's notion was that "a child's Indian tribe has a discrete interest, separate from a parent's or Indian custodian's, in any proceeding involving the child that must be protected throughout."[79] Notice must be given to parents, or the Secretary of the Interior if the parents' location is unknown, and to the relevant tribe(s).[80] This requirement is extremely important. Without proper notice the underlying principles of the Act are frustrated because none of the Indian parties enter the action to protect the tribal interests and the child's interests as it relates to his or her Indian heritage.

D. Placement of Indian Children in Foster Care and Through Adoption

The goal of Congress was to place Indian children "in foster or adoptive homes which would reflect the unique values of Indian culture . . . ."[81] The Supreme Court stated in *Holyfield* that the placement preferences expressed in § 1915(a) of the Act are "[t]he most important substantive requirements imposed on state courts . . . ."[82] Absent good cause,[83] when placing a child in a foster home, the child must be placed with

> (i) a member of the Indian child's extended family; (ii) a foster home licensed, approved or specified by the Indian child's tribe; (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (iv) an institution for children approved by the Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.[84]

ICWA also requires that, absent good cause, Indian children placed for adoption must be placed with "(1) a member of the child's extended family; (2)

79. HANDBOOK, *supra* note 18, at 51 (citing *Holyfield*, 490 U.S. at 49).

80. 25 U.S.C. § 1912(a).

81. *Id.* § 1902.

82. *Holyfield*, 490 U.S. at 31.

83. *See supra* note 77 and accompanying text. The significance of giving a child discretion to determine jurisdiction on the condition that she reaches a certain age (the age of 12 if referring to the Bureau of Indian Affairs' good cause definition) is important. It diminishes the chances of finding tribal court jurisdiction. It allows room for a "mature" Indian child to make a decision which Congress implicitly expresses would be in the best interests of the child. This is a very rare instance where an Indian party may side with the non-Indian party.

84. 25 U.S.C. § 1915(b).

other members of the Indian child's tribe; or (3) other Indian families."[85] Clearly, these preferences show that Congress intended to allow all reasonable alternatives to keep the Indian child within the tribe whenever it was impossible to maintain the child's ties with his or her parents.[86]

IV. THE CASE OF GUARDIANSHIPS

A. Identifying the ICWA Guardianship

Section 1911 of the Act establishes exclusive jurisdiction for "[a]n Indian tribe . . . over any *child custody proceeding* involving an Indian child who resides or is domiciled within the reservation of such tribe . . . ."[87] Furthermore, "[w]here an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child."[88] A careful examination of the definitions provides insight as to when these provisions necessitate application of the Act. A child custody proceeding includes foster care placement. Foster care placement includes an action "removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a *guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand*, but where parental rights have not been terminated."[89] In other words, state courts must be aware that ICWA applies to a substantial amount of guardianships, and guardianships, ultimately, are a subset of foster care placements.

B. Misconstruing ICWA as It Applies to Foster Care Placements

Even if a court recognizes that some, but not all, guardianships are covered by ICWA, thereby successfully avoiding a missed opportunity to apply the Act, potential for misconstruing the Act as it pertains to foster care placements, specifically guardianships, remains a concern. The language of § 1913(b) of the Act, which states, "[a]ny parent or Indian custodian *may withdraw consent to a foster care placement* under State law at any time *and*, upon such withdrawal, *the child shall be returned to the parent or Indian custodian*,"[90]

85. *Id.* § 1915(a).

86. HANDBOOK, *supra* note 18, at 84. While these are legitimate means of carrying out the objectives of Congress, many states continue to overwhelmingly place Indian children in non-Indian homes, a problem the construction of the scope and jurisdictional requirements were intended to eliminate. *Id.* Jones points out that this does not necessarily reflect ignorance of ICWA, but may more likely be a result of difficulties arising in recruiting Indian foster homes, especially in urban areas with small Indian populations. *Id.*

87. 25 U.S.C. § 1911(a) (emphasis added).

88. *Id.*

89. *Id.* § 1903(1)(i) (emphasis added).

90. *Id.* § 1913(b) (emphasis added).

seems to contradict the meaning of foster care placement.[91] Reciting an excerpt from the trial court's decision, the appellate court in *In re K.L.R.F.* stated in its opinion, "[§ 1913(b)] provides that consent can be withdrawn at any time with regard to a foster care placement; and [§ 1903(1)(i)] just as explicitly states that in a foster care placement, the parent or Indian custodian cannot have the child returned upon demand."[92] Further, the trial court noted that "if § 1903 is in fact what the legislature intended the definition of 'foster care placement' to be, then § 1913(b) can be given no effect because a foster care placement by definition precludes the possibility of a parent being entitled to the return of the child upon demand."[93]

The court in *In re K.L.R.F.* construed § 1913(b) to apply to situations where a "*consensual* foster care placement [is] made in the first place and there is no inherent bar to a withdrawal of the consent."[94] The court enumerated three principles behind this decision. First, "the drafters of the statute did not intend a result that is absurd or impossible of execution."[95] Second, "the drafters did intend the entire statute to be effective and certain."[96] Finally, "statutes enacted to benefit American Indians must be liberally construed with all doubts resolved in favor of the Indian seeking its benefits or protections."[97] Thus, the provisions interact in such a way that they do not nullify each other.[98]

The Federal Register, which provides guidelines to help clarify ICWA, states that "[v]oluntary placements which do not operate to prohibit the child's parent . . . from regaining custody of the child at any time are not covered by the Act."[99] The Alaska Supreme Court has explained that the

> [c]ommentary to guideline B.3, which explains the reasons for creating this exception, specifically refers to [formal written agreements between private groups or states and parents for temporary custody] and stresses how such agreements are to be structured so that ICWA will not apply to them . . . . *The guidelines recommend that the parties to such agreements explicitly provide for return of the child upon demand if they do not wish the Act to apply to such placements*. Inclusion of such a provision is advisable because courts frequently assume that when an agreement is reduced to writing, the parties have only those rights specifically written into the agreement.[100]

91. *See supra* text accompanying note 89.
92. 515 A.2d 33, 36-37 (Pa. Super. Ct. 1986).
93. *Id.* at 37.
94. *Id*.
95. *Id*.
96. *Id*.
97. *In re* K.L.R.F., 515 A.2d at 37.
98. *Id.*
99. 44 Fed. Reg. 67,587 (Nov. 26, 1979).
100. D.E.D. v. Alaska, 704 P.2d 774, 781-82 (Alaska 1985).

The Alaska Supreme Court, in *D.E.D v. Alaska*, determined that a voluntary care agreement entered into by the biological mother with a family and youth services organization, which allowed the state to provide temporary foster care for the minor child, did not fall into ICWA's definition of foster care placement since the child could be returned to the mother "at any time."[101] This explanation by the Alaska Supreme Court, accompanied with the guidelines set forth by the Federal Register, reveals that, if a court is faced with the situation of a guardianship where the child can be returned upon demand, it is not a child custody proceeding, and ICWA does not apply. However, § 1913 only becomes relevant after determining that the requirements of § 1903 have not been satisfied. As the *D.E.D.* court explained, if the agreement fulfills the suggestions by the guidelines for voluntary placement, that is, the parent understands the terms, her intention is to use it for a short time (a few days perhaps) and it is signed, ICWA is inapplicable. Thus, it does not have to satisfy the requirements of § 1913.[102]

C. Case Illustrations of ICWA Guardianship Identification

Since the legislation's inception in 1978, few courts have invoked ICWA on account of the involvement of a guardianship proceeding of an Indian child. Since the purpose of this legislative Note is to increase judicial awareness, it is instructive to consider some of these ICWA guardianship cases. Elaborating on some of these cases may be useful in improving identification of ICWA guardianships.

1. Grandparents as "Guardians"

In re A.K.H. involved a grandmother who successfully sought sole physical and legal custody of the Indian child with visitation rights to the parents whose parental rights were not terminated.[103] While the parents were granted limited rights, the nature of the guardianship did not allow for the return of the child upon demand.[104] The appellate court faced the issue of whether the Indian tribe had a statutory right to intervene in the district court proceeding under ICWA.[105] The court had to first determine whether the proceeding involved a foster care placement.[106] The court considered the four prongs of ICWA foster care placement: "(1) removing the Indian child from the child's parent or Indian custodian; (2) temporarily placing the child in a 'foster home or institution or the home of a guardian or conservator' where; (3) the parent or

101. *Id.* at 777, 781.
102. *Id.* at 782.
103. *In re* A.K.H., 502 N.W.2d 790, 792 (Minn. Ct. App. 1993).
104. *Id.*
105. *Id.* (citing 25 U.S.C. § 1911(c)).
106. *Id.* at 792.

Indian custodian cannot have the child returned upon demand; and (4) parental rights have not been terminated."[107] Concluding that prongs one, three and four had been met, the focus of the court's opinion was on prong two.[108]

In beginning its analysis, the Minnesota court referred to state statutes. "Foster care" is defined under Minnesota statute as:

> the 24 hour a day care of a child in any facility which for gain or otherwise regularly provides one or more children, when unaccompanied by their parents, with substitute for the care, food, lodging, training, education, supervision or treatment they need but which for any reason cannot be furnished by their parents or legal guardians in their homes.[109]

The court did not believe the grandmother's home qualified as a foster home based on this definition, so it focused its attention on the possibility of guardianship status.[110] Because the term "guardian" is not defined under the Act, the court used the Minnesota statutory definition. A guardian of a minor "has the powers and responsibilities of a parent . . . ."[111] A guardian can "facilitate the ward's education, social and other activities and authorize medical care."[112] The court determined that these powers would be granted to the grandmother if she were awarded custody. Thus, the proceeding encompassed the term guardian under ICWA, and ICWA applied.[113]

2. Temporary Placement as "Foster Care Placement"

A Washington appellate court faced the same issue in defining guardian with no guidance from the Act.[114] There, the Indian tribe sought to vacate an order awarding permanent custody of an Indian child to his natural mother's parents because the tribe had neither been notified of nor appeared at the custody hearing.[115] Neither party disputed that it was an involuntary proceeding and the child was an Indian. The child, S.B.R., was removed from the father for temporary placement, as opposed to a permanent adoptive placement,[116] and was put in the custody of the grandparents. Instead of looking to state statutory law defining guardian, the court simply relied on dictionary definitions. It concluded that the rights acquired by the

107. *Id.* (citing 25 U.S.C. § 1903(1)(i)).
108. *A.K.H.*, 502 N.W.2d at 792.
109. *Id.* at 792-93 (quoting MINN. STAT. § 260.015 (1994)).
110. *Id.* at 793.
111. *Id.* (quoting MINN. STAT. § 525.619 (1994)).
112. *Id.* at 793.
113. *A.K.H.*, 502 N.W.2d at 793.
114. *In re* S.B.R., 719 P.2d 154, 156 (Wash. Ct. App. 1986).
115. *Id.* at 155 (citing 25 U.S.C. § 1911(c)).
116. *Id.* at 156 (citing 25 U.S.C. § 1903(1)(iv)).

grandparents qualified as ICWA guardianship rights under any definition.[117] Since the father could not have the child returned upon demand, but could only seek to modify the child custody decree,[118] this was a foster care placement proceeding contemplated by ICWA.[119]

3. Maternal Relatives as "Indian Custodians"

On appeal in state court, the Navajo Nation Indian tribe, in *In re Ashley Elizabeth R.*,[120] contested the "good cause" finding by the district court.[121] However, the interesting issue the lower court faced, as it pertains to ICWA guardianships, was whether the two Indian children in the case were transferred by a "parent or Indian custodian."[122] This is another technicality of the foster care placement definition that cannot be overlooked. The two children were not living with their parents at the time of the guardianship proceeding.[123] Instead, they were under the custody of their paternal great-aunt.[124] The tribe successfully argued that this aunt constituted an Indian custodian.[125] An Indian custodian is "any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child."[126] Based on a tribal social worker's testimony, the court determined that Navajo tradition dictated that custody of orphaned children is vested within the mother's family.[127] This usually meant the maternal grandmother was awarded custody.[128] If the grandmother was not alive, as in this case, then a maternal aunt was sufficient to satisfy the Indian custodian requirement.[129] Thus, fulfilling all other requirements of the foster care placement definition, ICWA was applicable in the guardianship proceeding.[130]

4. The Proper Incorporation of State Law

The aforementioned cases all involve Indian children and guardianships. However, it is also instructive to look at a procedurally complex case that does

117. *Id.*; *see also* WEBSTER'S NEW WORLD DICTIONARY 599 (3d ed. 1988); BLACK'S LAW DICTIONARY 712 (7th ed. 1999).

118. *S.B.R.*, 719 P.2d at 156 (citing WASH. REV. CODE § 26.09.260 (1985)).

119. *Id.*

120. 863 P.2d 451 (N.M. Ct. App. 1993).

121. *See supra* note 77.

122. *Ashley Elizabeth R.*, 863 P.2d at 453 (citing 25 U.S.C. § 1903(1)(i)).

123. *Id.* at 452.

124. *Id*.

125. *Id*. at 453.

126. *Id*. (quoting 25 U.S.C. § 1903(6)).

127. *Ashley Elizabeth R.*, 863 P.2d at 453.

128. *Id*.

129. *Id*.

130. *Id*.

not involve an Indian child. *Stevens v. Redwing*,[131] a case decided by the Eighth Circuit Court of Appeals, presents the exact fact pattern that gives rise to the guardianship dilemma, and thus is a useful tool for understanding the overlooked issues with ICWA guardianships. The plaintiff, Stevens, was serving a prison sentence with the Missouri Department of Corrections for second degree murder.[132] While on parole he married and his daughter, Jami Lynn, was born in 1990.[133] The plaintiff's wife died shortly thereafter in a car accident.[134] Stevens returned to prison after a parole violation, and the child's maternal grandparents, the Sanders, began caring for Jami Lynn.[135] In 1993, Stevens consented to the appointment of the grandparents as guardians and conservators for his daughter.[136] The plaintiff filed a formal consent with the probate division of the Circuit Court of Stone County, Missouri, which stated, "I understand that I shall not have any right or claim to control or custody of such child . . . ."[137]

In March of 1993, the child's maternal aunt, defendant Redwing, came from her home in Georgia to take Jami Lynn back to live with her and her husband with the consent of the guardians and conservators.[138] The Redwings sought permanent custody of Jami Lynn through the Georgia state juvenile court.[139] Without approval of the Missouri probate court, the Sanders consented to the change in custody in the Georgia proceeding.[140] Ultimately, the Georgia court awarded the Redwings permanent custody of Jami Lynn.[141]

The Sanders then petitioned the Missouri court to terminate their guardianship due to their health problems.[142] The court denied multiple motions and written objections that Stevens filed in that court.[143] Eventually, the court terminated the grandparents' guardianship of Jami Lynn and forfeited

131. 146 F.3d 538 (8th Cir. 1998). Because this was a diversity suit, the action was in federal court, but Missouri law applied.

132. *Id.* at 541.

133. *Id*.

134. *Id*. at 541-42.

135. *Id*. at 542.

136. *Stevens*, 146 F.3d at 542. It is worth noting that *Stevens* is distinguished from the scenario in *D.E.D.* because, although there was a consensual, or voluntary agreement in *Stevens*, no provision indicated that the child could be returned upon demand. In fact, it was quite the opposite, wherein the father consented to relinquish all rights to the child. Thus, it did "operate to prohibit the child's parent . . . from regaining custody of the child at any time." *See supra* text accompanying notes 99-102.

137. *Stevens*, 146 F.3d at 542.

138. *Id*. (grandparents consented because both were ill).

139. *Id*.

140. *Id*.

141. *Id*.

142. *Stevens*, 146 F.3d at 542.

143. *Id*.

jurisdiction to the state of Georgia.[144] Stevens filed a notice of appeal with the probate court; however, the appeal was never processed.[145]

In January 1995, the Redwings filed a petition in Georgia to terminate Stevens' parental rights alleging sexual abuse of the minor child.[146] While that action was still pending, Stevens filed suit in federal court seeking money damages for various torts.[147] In his complaint he named the Redwings as defendants and, among other claims, alleged conspiracy to interfere with his custody rights. The district court granted the defendants' motion to dismiss all claims for lack of personal jurisdiction. On appeal, the Eighth Circuit considered the causes of action raised by Stevens.

On the issue of whether the Redwings conspired to interfere with Stevens's custody of Jami Lynn, the court held that Stevens had no custody right in the state of Missouri that would give defendants an opportunity to interfere.[148] In Missouri, interference with custody may only be asserted by one who has custody rights.[149] The court emphasized that Stevens had consented to appointment of the grandparents and even acknowledged he no longer had "any right or claim to control or custody of such child."[150] Furthermore, he understood "that the appointment [was] permanent and [would] not be set aside merely at [his] request."[151]

The court then considered the Missouri statutory law dealing with the rights of a guardian. A Missouri statute provides that "[t]he guardian of the person of a minor shall be entitled to the custody and control of the ward . . . ."[152] In other words, the statute specifies the order of authority between a guardian and the non-guardian parent. The guardian has the ultimate right to make decisions for the child, while the parent has lost these custodial and controlling rights. Although Stevens *voluntarily* surrendered physical custody of Jami Lynn and parental rights had not been terminated, the formal consent relinquishing all his legal custody rights, combined with the rights of a guardian established by Missouri statutory law, did not allow for the return of the child upon Stevens's demand.[153]

144. *Id*.

145. *Id*.

146. *Id*.

147. *Stevens*, 146 F.3d at 542. The tort claims included "conspiracy to interfere with his custody rights, conspiracy to interfere with a contract, conspiracy to harbor a child, conspiracy to alienate the affections of his daughter, defamation, malicious prosecution, and intentional infliction of emotional distress." *Id*.

148. *Id*. at 544.

149. *Id*. (citing Politte v. Politte, 727 S.W.2d 198, 199-200 (Mo. Ct. App. 1987)).

150. *Id*.

151. *Id*.

152. MO. REV. STAT. § 475.120 (2000).

153. *Stevens*, 146 F.3d at 544.

V. ANALYSIS OF ICWA GUARDIANSHIPS

A. Missing the Opportunity

To answer whether courts miss the opportunity to apply ICWA in guardianship proceedings, the first question that must be asked is whether courts even identify guardianships as potential triggers for ICWA application. Evidence suggests that some do not. As witnessed in some proceedings involving Indian children and guardianships, it is apparent that there is not a clear understanding or awareness of the notion that some guardianships are governed by ICWA. For example, the decision by the Montana Supreme Court in *In re Bertelson*[154] clearly shows that guardianship proceedings, which call for Indian tribal jurisdiction, are not always identified.

Bertelson concerned a custody dispute between the natural mother and grandparents of an Indian child. The *Bertelson* court categorized the conflict as "an internal family dispute"[155] and held that ICWA was not intended to cover such proceedings.[156] Rather, the Act was intended to "preserve Indian culture values under circumstances in which an Indian child is placed in a foster home or other protective institution."[157] The *Bertelson* decision suggests that judges and attorneys believe ICWA only applies when a state, rather than a private party, is seeking placement out of the home. This is a minority position, but one that is followed by a number of state and federal courts.[158] There is, however, no explicit language in the Act which makes such a distinction between a public and private party seeking involuntary placement.[159]

The confused issue of identifying ICWA guardianship proceedings signals danger because, once the opportunity to apply the Act is overlooked, state law

154. 617 P.2d 121 (Mont. 1980).

155. *Id.* at 126.

156. *See id*. at 125.

157. *Id*.

158. *See, e.g*., R.J. Williams Co. v. Fort Belknap Hous. Auth., 719 F.2d 979, 985 (9th Cir. 1983) (requiring, for the invocation of federal jurisdiction, that the dispute arise from substantial activities outside the reservation); Comanche Indian Tribe v. Hovis, 847 F. Supp. 871, 876 n.4 (W.D. Okla. 1994) (recognizing the split among courts as to ICWA application to intra-family disputes); *In re* Baisley, 749 P.2d 446, 449 (Colo. Ct. App. 1987); *In re* A.K.H., 502 N.W.2d 790, 794 (Minn. Ct. App. 1993) (recognizing, but declining to follow, the minority view); Desjarlait v. Desjarlait, 379 N.W.2d 139, 142 (Minn. Ct. App. 1985) (finding that states may have no authority over internal affairs of the reservation unless state jurisdiction is voluntarily invoked by those within); *In re* C.W., 479 N.W.2d 105, 112-13 (Neb. 1992); *In re* Skillen, 956 P.2d 1, 18-19 (Mont. 1998); State v. Horseman, 866 P.2d 1110, 1114-15 (Mont. 1993); *In re* Zier, 750 P.2d 1083, 1084 (Mont. 1988).

159. *See* 25 U.S.C. § 1903(1) (defining "child custody proceeding"); *see also* A.B.M. v. M.H., 651 P.2d 1170, 1173 n.6 (Alaska 1982) (declining to follow *Bertelson* because the court's interpretation was contrary to express provisions of the Act).

is applied, defeating the purpose of the federal legislation. There is practically no way of assessing how frequently this issue has actually slipped through the cracks. It is worth exploring the probable cause for missing these opportunities as an instrument for decreasing the level of ignorance among courts nationwide.[160]

The problem exists, in part, because of the commonly accepted definitions pertaining to guardianships and child custody proceedings, coupled with the assumption that ICWA is inapplicable. The Act does not define "guardian"[161] or "guardianship." The common legal definition of guardian is "[o]ne who has the legal authority and duty to care for another's person or property, [especially] because of the other's infancy, incapacity, or disability."[162] The Supreme Court of Alaska adopted another common definition of the term.[163] The court determined that, in an Indian child guardianship proceeding, a guardian is (1) a person who guards, protects or takes care of another person or (2) a person legally placed in charge of the affairs of a minor.[164] A guardianship is defined as "the position and responsibilities of a guardian, [especially] toward a ward."[165] The common legal definition of "custody hearing" is "a judicial examination of the facts relating to parental custody in a divorce or separation proceeding."[166] "Custody" is defined as "[t]he care, control, and maintenance of a child awarded by a court to a relative, [usually] one of the parents, in a divorce or separation proceeding."[167]

These definitions are far from suggesting that custody of a minor child and the guardianship of a minor child are one and the same as ICWA indicates. However, there are similarities. For instance, care for a person because of infancy seems substantially related to parenting, an issue in custody hearings.

160. Proponents of Indian rights commonly invoke the state-tribal relationship argument for explaining why Indians have been neglected in a specific area of the law. That is, both parties have interests in controlling land and resources. But, because tribes have been at a political disadvantage for years, state judicial/governmental structures have prevailed in most cases. *See generally* U.S. COMMISSION ON CIVIL RIGHTS, INDIAN TRIBES: A CONTINUING QUEST FOR SURVIVAL 41-43 (June 1981). While this may be a plausible argument for the issue at hand, it will not be the focus of the ensuing analysis.

161. *See supra* text accompanying notes 109-117.

162. BLACK'S LAW DICTIONARY 712 (7th ed. 1999). Guardian is also termed "custodian." *See also* 25 U.S.C. § 1903(1)(i) (including "conservator" in its definition of foster care placement). Because "guardianships" and "conservatorships" are nearly identical, this Note focuses solely on guardianships. Implicitly, "conservators" have the same relative rights as do guardians under ICWA.

163. *See* J.W. v. R.J., 951 P.2d 1206, 1213 n.12 (Alaska 1998).

164. *See id*. (citing WEBSTER'S NEW WORLD DICTIONARY 620 (1972)).

165. WEBSTER'S COLLEGE DICTIONARY 593 (Robert B. Costello ed., 1995).

166. BLACK'S LAW DICTIONARY 390 (7th ed. 1999). There is no legal definition for child custody proceeding, the term defined in 25 USC § 1903, thus "custody hearing" is defined in its place for the sake of explaining the problem.

167. *Id*.

However, the mention of either term does not automatically trigger its association with the other. It is possible that judges and attorneys simply fail to think of ICWA as a possibility when a guardianship is at stake because they naturally are not considering it within the scope of a custody hearing, or a child custody proceeding.

Similarly, there is a significant difference between adoptions of Indian children, which fall under ICWA, and guardianships which do not fall under the same provision. A California appellate court in *Jacqueline L. v. Eric L.*[168] explained that "[a]doptions are permanent. For better or worse, the parties are stuck with each other. Not so with guardianships, which can be ended with a court hearing."[169]

The same is true when considering "foster care placements," a subset of child custody proceedings under ICWA.[170] One legal definition of foster care placement is "[t]he [usually temporary] act of placing a child in a home with a person or persons who provide parental care of the child."[171] State statutes that define terms such as "foster care," "foster care placement," or "foster home" are rare. Colorado defines foster care as "the placement of a child into the legal custody or legal authority of a county department of social services for physical placement of the child in a certified or licensed facility."[172] In Maine, long-term foster care is "a foster placement for a child in the custody of the department in which the department retains custody of the child while delegating to the foster parents the duty and authority to make certain decisions."[173] Arizona defines foster home as: "a home maintained by any individual or individuals having the care or control of minor children, other than those related to each other by blood or marriage, or related to such individuals, or who are legal wards of such individuals."[174]

These definitions have a common theme: there is no mention of the word guardian or guardianship. Consequently, while guardianships and foster care placements are generally temporary, the perception of foster care placement is that it does not include guardianships found within the ICWA definition of foster care placement. Thus, it is not reasonable to believe a court is automatically put on notice that ICWA could apply when there is a guardianship proceeding.

A closer analysis of statutory language among various states more clearly reveals the idea that there is insufficient notice of potential ICWA applicability in guardianship proceedings. Consider the definition of "custody proceeding"

168. 39 Cal. Rptr. 2d 178 (Cal. Ct. App. 1995).
169. *Id.* at 181.
170. *See* 25 U.S.C. § 1903(1)(i).
171. BLACK'S LAW DICTIONARY 666 (7th ed. 1999).
172. COLO. REV. STAT. § 19-1-103 (2000).
173. ME. REV. STAT. ANN. tit. 22, § 4064 (West 1999).
174. ARIZ. REV. STAT. § 8-501 (1999).

in the state of Arizona, one of the most heavily Indian-populated states in the union:[175] "'Custody proceeding' means proceedings in which a custody determination is one of several issues, such as an action for divorce or dissolution of marriage or separation, and includes child neglect proceedings."[176] There is no mention of guardianship within the definition. Because the statute uses the words "such as," the possibility is left open for including guardianships within its definition. But, this possibility is left for the court's discretion. If the court does not consider a guardianship, then it falls outside of the statutory definition. This augments the tendency of courts to not consider whether ICWA is applicable. Courts are even more likely to overlook the definition of "child custody proceeding" within ICWA.

Analysis of the Michigan statute is very similar. A custody proceeding under Michigan statutory law, "includes proceedings in which a custody determination is [one] of several issues including, but not limited to, an action for divorce or separation and child neglect and dependency proceedings."[177] In *Foster v. Stein*,[178] the court expanded this analysis by holding that adoption proceedings are included in the definition of a "custody proceeding."[179] Nevertheless, there is no reference to guardianship. The statutory language, "but not limited to," indicates that it is possible for a guardianship to fall within the definition. This determination, however, is left to the court's discretion. If

175. It is worthwhile to discuss Indian population among various states. In 1990, 1.878 million persons, representing 0.8% of the nation's population, reported themselves as Native Americans. Some jurisdictions seldom have reason to consider ICWA because there is a low level of Indian residents. Thus, a lack of familiarity with the Act may be even greater in areas such as Pennsylvania, West Virginia, Illinois, Ohio, Virginia, Massachusetts, Tennessee, South Carolina, Connecticut, Kentucky, New Hampshire and Indiana where Native Americans compose no more than 0.2% of the entire state's population. Perhaps, judges from the above listed states are even more prone to misconstruing or considering ICWA application. *See generally* ALMANAC OF THE 50 STATES: BASIC DATA PROFILES WITH COMPARATIVE TABLES (Edith R. Hornor ed., 2000).

States heavily populated with Native Americans, however, have even greater incentive to enact court rules and statutes that provide for clear directives as they pertain to ICWA. Some of the most heavily populated states include: Oklahoma—population 252,089 (representing 8.0% of total population); California—population 236,078 (representing 0.8% of total population); Arizona—population 203,009 (representing 5.5% of total population); New Mexico—population 134,097 (representing 8.9% of total population); Alaska—population 31,245 (representing 5.7% of total population); South Dakota—population 50,501 (representing 7.3% of total population); Montana—population 47,524 (representing 5.9% of total population); and North Dakota—population 25,870 (representing 4.0% of total population). Other states which are mentioned in this Note include: Michigan—population 55,131 (representing 0.6% of total population); Minnesota—population 49,392 (representing 1.1% of total population); Missouri—population 19,508 (representing 0.4% of total population). *See generally id.*

176. ARIZ. REV. STAT. § 25-432(3) (2000).

177. MICH. COMP. LAWS § 600.652(c) (2000).

178. 454 N.W.2d 244 (Mich. Ct. App. 1990).

179. *Id.* at 246.

courts have traditionally excluded "guardianships" from the definition, then they are likely to also assume exclusion from coverage under ICWA.

This explanation cannot be completely persuasive because there are state statutes that specifically provide for inclusion of guardianship actions within custody proceedings. For example, the framework of the Missouri statute is as follows: "'Custody proceeding' includes proceedings in which a custody determination is one of several issues, such as an action for dissolution of marriage, legal separation, separate maintenance, *appointment of a guardian of the person*, child neglect or abandonment . . . ."[180] In these jurisdictions, where the state statute actually indicates that guardianships are custody proceedings, it seems that judges and lawyers are more likely to be put on notice that ICWA may apply.[181] The court would then have reason to know it needs to inquire into whether the child is of Native American ancestry.[182]

B. The Courts' Role: A Step Further

Perhaps the problem has come about because some state legislatures have not enacted provisions that clearly direct courts to ICWA in applicable situations. However, courts must bear at least as much of the responsibility as legislators. The issue of whether ICWA applies to minor guardianship proceedings could become conspicuous with the enactment of court rules that address ICWA's applicability. The court rules of Michigan are illustrative of the inadequate direction taken by some state court rules as they pertain to child custody hearings.

In Michigan, court rules, rather than legislation, address ICWA issues.[183] At the outset of a child *protective* proceeding, a preliminary hearing must be conducted where a number of items are addressed.[184] One procedural provision mandates that the court "inquire if the child or parent is a registered member of any American Indian tribe or band, or if the child is eligible for

180. MO. REV. STAT. § 452.445 (2000) (emphasis added).

181. The Oklahoma statute is another example of a "notice" statute. The language provides that "'[c]hild custody proceeding' means a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency, *guardianship*, paternity, termination of parental rights, and protection from domestic violence . . . ." OKLA. STAT. ANN. tit. 43, § 551-102 (West 1999) (emphasis added). Note that Oklahoma, like Arizona, is one of the more heavily Indian-populated states making the inconsistency among the states even more perplexing.

182. *See supra* notes 6-12 and accompanying text (explaining the proper application of ICWA).

183. *See* MICH. CT. R. 5.965, 5.980.

184. *See* MICH. CT. R. 5.965(B)-(C) (including procedures for reading the petition in open court, determining if the petition should be dismissed, advising the parties of their rights, allowing respondent the opportunity to admit or deny allegations, authorizing the filing of the petition and determining pre-trial placement of the minor child).

such membership."[185] If this is the case, the court must then "determine and notify the tribe or band and follow the procedures [for child custody proceedings concerning American Indian children]."[186] This language directs the court to provisions set forth under another court rule, which states that "[i]f any Indian child as defined by the Indian Child Welfare Act [25 U.S.C. §§ 1901-63] is the subject of a *protective proceeding* or is charged with an offense in violation of [certain juvenile delinquency statutes],"[187] then the procedures enumerated within the rule must be applied.[188]

The provisions make reference to ICWA, and they make reference to child custody proceedings concerning Indian children. Surprisingly, however, the rules are not structured to guide, much less instruct, a judge to consider ICWA if a guardianship proceeding is at bar or if there is a custody dispute between natural Indian parents and third parties. The construction of the rule becomes even more peculiar when considering what is included within it. Michigan Court Rule 5.980 mingles ICWA with child protective proceedings and delinquency proceedings. A child protective proceeding concerns "an offense against a child,"[189] but it is not explicitly a category of child custody proceeding under ICWA.[190] Furthermore, ICWA does not apply to delinquency placements. A delinquency proceeding, in Michigan, concerns "an offense against a juvenile."[191] An "act which, if committed by an adult, would be deemed a crime" is not subject to ICWA.[192] Nevertheless, the courts of Michigan borrow the federal definition of "Indian child"[193] and combine it with the state's court rule language pertaining to protective proceedings and delinquency proceedings.[194] This combination of law is used to ascertain whether the procedures within the court rule handling child custody proceedings concerning American Indian children apply.[195]

Studying this explicit language in the court rule, the concern then becomes apparent. A judge may easily overlook the possibility of ICWA application to guardianships and other custody battles involving third parties and the natural parents inasmuch as those court rules are otherwise silent.

185. MICH. CT. R. 5.965(B)(7).

186. *Id*.

187. MICH. CT. R. 5.980(A) (emphasis added).

188. *See id*.

189. MICH. CT. R. 5.903(A)(2).

190. *See* 25 U.S.C. § 1903(1).

191. MICH. CT. R. 5.903(A)(3).

192. *Id. See also supra* note 54 and accompanying text.

193. *See* 25 U.S.C. § 1903(4) ("'Indian child' means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe . . . .").

194. *See* MICH. CT. R. 5.980(A).

195. *See id*.

C. The Hierarchy of Power: Guardianship Rights vis-à-vis Parental Rights

Even if an Indian child is involved in a guardianship-related child custody proceeding, ICWA does not apply in all guardianships. The guardianship at issue must be one that does not allow for the return of the child upon demand of the non-guardian parent.[196] In this situation, a significant amount of power is granted to the guardian as compared to the natural parent. This lopsided balance of power must exist for ICWA to apply.[197] If a state statute allows the parent to demand the child back under any circumstances, then the guardianship does not lie within the definition of foster care placement and, thus, is not a child custody proceeding signaling ICWA application.

The key inquiry involves the comparison between the rights of the guardian and the rights of the custodial parent. When the parent has relinquished custody but the parental rights have not been terminated by the court, as was the case in *A.K.H.*,[198] *S.B.R.*[199] and *Ashley Elizabeth R.*,[200] state statutory law heavily favors the guardian.[201] Accordingly, this most likely

196. 25 U.S.C. 1903(1)(i). *See also supra* notes 10, 89 and accompanying text.

197. *See supra* text accompanying notes 101-130 for illustrations of this balance of power. *See also* text accompanying notes 131-153 for a discussion of *Stevens v. Redwing*, 146 F.3d 538 (8th Cir. 1998), the non-ICWA case which presents similar guardianship issues as those being discussed in this section. This is the type of guardianship ICWA is intended to govern if the child involved is an Indian child.

In *Stevens*, the guardianship of the grandparents did not allow for Stevens to demand the child back if he desired. At best, explained the court, the father could have undertaken a separate action in Missouri probate court to terminate the guardianship and to restore his right to custody. *See id*. at 544. Ultimately, though, no immediate return of the child to the father was possible. Stevens did make various motions and appealed the order of termination of guardianship in the Missouri probate court, following the instructions set out in the statute. *See id*. at 542. Thus, the actions of the Missouri probate court were the real focus of the examination. The federal court was not responsible for the decision made in the Missouri court. *See id*. at 544. Furthermore, the actual interests of the child were not in question in the federal court action; the issue was whether the defendant was liable to the father in tort.

The proceedings in the probate court illustrate a situation where a missed opportunity to apply ICWA can occur. Assuming Jami Lynn was not an Indian child, no application of ICWA was relevant. However, if the child were Indian, the court would have to be aware that the guardianship was one that met the definition of "child custody proceeding" under ICWA. At that point, all the procedural and substantive aspects of the law would come into play. Most importantly, the tribal court would have to be put on notice, so it would have the opportunity to become involved in the action.

198. *In re* A.K.H., 502 N.W.2d 790 (Minn. Ct. App. 1993).

199. *In re* S.B.R., 719 P.2d 154 (Wash. Ct. App. 1986).

200. *In re* Ashley Elizabeth R., 863 P.2d 451 (N.M. Ct. App. 1993).

201. *See, e.g.*, ALASKA STAT. § 47.10.084(e) (Michie 2000) ("When there has been transfer of legal custody or appointment of a guardian and parental rights have not been terminated by court decree, the parents shall have residual rights and responsibilities," not including the right to have the child returned upon demand.); CAL. PROB. CODE § 2351 (Deering 2000) (stating that, subject to limitations on care, custody and control determined by the court, "the guardian or

means that the parent could not demand the return of the child. Thus, in most states, the court must conclude that ICWA applies if in fact the child is deemed to be an Indian. If parental rights have not been terminated, statutes are not always clear as to whether the child can be returned upon demand. Most of these statutes allow judicial discretion to determine the rights and responsibilities of the parties.[202] If this is the case, then the statute does not specify whether the non-custodial parent(s) still can demand the release of the child from the guardian. This is an unsettling issue which courts have not addressed. Nevertheless, what is clear is that, if (1) the parent cannot demand the child back and (2) the child is an Indian, ICWA applies. If the parent can demand the child back, regardless of whether the child is an Indian, ICWA does not apply.

D. Applying ICWA When State Law Ambiguously Defines a Guardianship

Assuming that the court is able to correctly recognize that ICWA may apply to a guardianship proceeding and it correctly construes the federal provisions, specifically 25 U.S.C. §§ 1903 and 1913, a state statute or court rule may be ambiguous as to whether a child can be returned upon demand.[203] As discussed in *In re J.B.*, "the nature of the proceeding is determined by what is pending or potentially pending before the state court."[204] This means that the state court has both the authority and the obligation to determine the type of proceeding before it. Relying on its own law, the court often lacks the applicable rules to characterize a proceeding. There is no case law determining whether ICWA applies in these ambiguous situations. Without an agreement between the parties specifying whether the child can be returned upon

conservator, has the care, custody, and control of . . . the ward or conservatee."). *See also* COLO. REV. STAT. § 15-14-312 (2000); IDAHO CODE § 15-5-209 (Michie 2000); 705 ILL. COMP. STAT. 405/1-3 (2000); MICH. STAT. ANN. § 27.15215 (Michie 2000); N.M. STAT. ANN. § 32A-4-31 (Michie 2000).

202. *See, e.g.*, ARIZ. REV. STAT. § 8-871(D) (2000) ("Unless otherwise set forth in the final order of permanent guardianship, a permanent guardian is vested with all rights and responsibilities set forth in [other sections of the statutes] . . . ."). This statute gives the court primary authority to decide rights of the parties. If the court does not specify, then statutory law controls. For an example of a state which handles this matter slightly differently by allowing a recommendation from a state agency to be submitted to the court, see ARK. CODE ANN. § 9-27-338 (Michie 1999).

203. Michigan is one state where the statute and court rules lend no direction in this regard to child custody proceedings. Interestingly, however, the child *protective* proceedings are more detailed in regard to problems of similar nature.

204. *In re* J.B., 900 P.2d 1014, 1017 (Okla. Ct. App. 1995) (referring to §§ 1903 and 1911(b) of the Act).

demand,[205] a court is entirely left to itself to determine whether ICWA applies. Considering the statutory construction of ICWA, courts should rule that, if a statute or court rule lacks clarity, and it cannot be determined that a parent cannot take the child back upon demand, there is a presumption that the child cannot be returned, and, consequently, ICWA applies. Subsequently, the proceeding should be halted until the tribe is put on notice.[206]

Arriving at this conclusion, the underlying principle is that

> Congress through the Indian Child Welfare Act has expressed its clear preference for keeping Indian children with families, deferring to tribal judgment on matters concerning the custody of tribal children, and placing Indian children who must be removed from their homes within their own families or Indian tribes. Proceedings in state courts involving the custody of Indian children shall follow strict procedures and meet stringent requirements to justify any result in an individual case contrary to these preferences. The Indian Child Welfare Act, the federal regulations implementing the Act, the recommended guidelines and any state statutes, regulations or rules promulgated to implement the Act shall be liberally construed in favor of a result that is consistent with these preferences.[207]

While, admittedly, the state rules defining proceedings such as guardianships and other foster care placements were not enacted for the specific purpose of catering to the needs of American Indians, it can easily be accepted that Congress, through ICWA, delegated some decision-making power to the states, so long as the principles of ICWA are instilled in their decisions. Thus, in deciding if the federal act applies, state court rules or, in this case, statutes are to be construed to favor ICWA application, because ICWA was enacted for the sole purpose of benefiting American Indian tribes, families, and children.

A second reason for applying ICWA when state law is unclear whether the guardianship allows for return of the child on demand is because it follows the historical approach in the interpretation of other provisions of the Act. Consider these three instances: first, if a parent asserts the possibility of Indian membership, the predominate approach is to assume this to be true until the tribe or other proper authority establishes that no Indian membership exists

205. *See supra* text accompanying notes 135 and 148-49 (discussing existence of written agreement between parties in *Stevens*). *See also supra* text accompanying note 99 (discussing existence of agreement between parties in *D.E.D.*).

206. *See* 25 U.S.C. § 1912(a). *See also supra* notes 79-80 and accompanying text; *see supra* text accompanying note 117.

207. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,854, 67,585-86 (Nov. 26, 1979). *See also In re* K.L.R.F., 515 A.2d 33, 37 (Pa. Super. Ct. 1986). ("statutes enacted to benefit American Indians must be liberally construed with all doubts resolved in favor of the Indian seeking its benefits or protections").

among the parties.[208] Second, ICWA requires transfer to tribal courts absent good cause.[209] While the Act does not define "good cause," practically all courts have adopted the Bureau of Indian Affairs definition, which restricts state courts.[210] Third, if the Indian child is not domiciled within an Indian reservation or is not a ward of the tribal court, there is still a presumption of tribal jurisdiction.[211] These historical approaches to applying the Act suggest a consistent interpretation that favors tribal involvement.

The liberal construction requirement and the historical interpretation of the Act suggest one common theme: ICWA is typically presumed to apply and the tribal court must be put on notice. This theme should permeate throughout all provisions, including § 1903(1)(i). This becomes even more apparent when considering that to rule otherwise would run afoul of the purposes of the Act: to preserve Indian heritage and properly determine the child's best interest.

E. The Effects of Missed Opportunities to Apply ICWA

The stated purpose of ICWA is "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for removal of Indian children [from their homes]."[212] In regard to the Indian child, what is clearly lost is any consideration of the unique best interests standard established by ICWA.[213] By including some guardianships under the definition of "child custody proceeding," Congress has communicated its belief that children in these proceedings are no different from children involved in adoption placement or custody proceedings. It seems illogical to think that an Indian child involved, for instance, in an adoption proceeding is entitled to more protection from the tribe. Or, put another way, there is no justification for providing an Indian child in a guardianship proceeding less protection than a child in an adoption proceeding.

Nonetheless, state statutes and court rules leave room for this to occur. Thus, the potential for cultural bias greatly increases in guardianship matters involving Indian children. This clearly frustrates Congress's belief that Indian children present a special situation where the tribal heritage has much positive impact on the child. Furthermore, if the tribe is not put on notice, then it is

208. *See* Helen Ann Yunis & Katherine Scotta, *The Indian Child Welfare Act: A Case Study*, 2 MICH. CHILD WELFARE J. 14, 15 (1998).

209. 25 U.S.C. § 1911(b).

210. *See supra* text accompanying note 77; Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. at 67,854.

211. *See* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 36 (1989); *see also* 25 U.S.C. § 1911(b).

212. 25 U.S.C. § 1902; *see also supra* text accompanying note 81.

213. *See supra* notes 25-34 and accompanying text (discussing the Indian child's best interest).

impossible for the tribe to offer any assistance to the child. Tribes often provide counseling services and other resources to Indian children and families during the course of these types of proceedings.[214] These sources could potentially alleviate some of the psychological strain on the child, provide assistance to parents with substance abuse problems or abusive behavior and even help avoid separation of the family.

Not only do these missed opportunities to apply ICWA affect Indian children, such circumstances hinder Indian tribes in seeing that ICWA's purposes are met. First and quite obviously, without knowledge that the proceeding is taking place, tribes cannot intervene to bid for keeping the child within the tribe. This again frustrates the statute's purpose to provide a means for preserving the Indian heritage. In this regard, the tribes have a significant interest in the member children.[215]

Second, tribes face problems intervening if it is discovered that they should have been put on notice at the commencement of the proceeding because it was determined that an Indian child was involved.[216] Because Congress intended to increase tribal participation, the litigation will be prolonged, complicated and more costly.[217] This has been a historical problem with the Act.[218] For instance, in *In re Elliott*,[219] in the middle of a proceeding to terminate parental rights, the trial court became aware that the child involved belonged to an Indian tribe.[220] The court had already heard testimony from expert witnesses from Catholic Family Services.[221] Nevertheless, it adjourned the proceedings

214. *See* Douglas R. Nazarian, Catholic Social Services Inc. v. C.A.A.: *Best Interests and Statutory Construction of the Indian Child Welfare Act*, 7 ALASKA L. REV. 203, 219 n.93 (1990).

> This contravenes the clear language of [§] 1912(d): Any party seeking to effect a . . . termination of parental rights to an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

Id.

215. *See id*. at 214.

216. *See* 25 U.S.C. § 1911(c) (giving the Indian child's tribe the right to intervene at any point in the proceeding).

217. *See* Nazarian, *supra* note 214, at 214.

218. While excessive litigation has been a historical problem with the Act, some states, like Michigan, have enacted court rules to alleviate the problem. Under MICH. COURT RULE 5.965(B)(7), a judge is required to ask if the child or either parent is a member of an American Indian tribe or band. Additionally, the petitioner must use a form with a pre-printed paragraph, which requires the petitioner to list tribal affiliation. This reduces the likelihood of discovering heritage later in the proceedings.

219. 554 N.W.2d 32 (Mich. Ct. App. 1996).

220. *See id*. at 33. The court did not recognize the child as an Indian child when the proceeding began because it did not follow the explicit directive in MICH. COURT RULE 5.965(B)(7) to inquire about the mother's or the minor child's tribal status. *See id.* at 38.

221. *Id.* at 33-34.

for further investigation of the issue and to notify the Chippewa Tribe.[222] The tribe petitioned the court to intervene, which the court allowed.[223] Ultimately, in terminating the child's parental rights, the court determined that although the child was an Indian and the Act was applicable, complying with certain provisions that would necessitate more litigation was not necessary.[224] The court's rationale was that the child had not been brought up as an Indian child in an Indian family,[225] and thus it did not "justif[y] a basis for delaying a decision in this case."[226] Since the mother was not intimately involved with her tribe, the benefits of allowing expert testimony at that juncture were not enough to outweigh the benefits of continuing the proceeding without such testimony.

The matter came before the state appellate court, which determined that the lower court had committed clear legal error in interpreting ICWA.[227] The court squarely rejected the "existing Indian family" exception in accordance with the Supreme Court's decision in *Mississippi Band of Choctaw Indians v. Holyfield*.[228] The court was concerned with the direct conflict the exception had with Congress's purpose of ensuring Indian cultural preservation.[229] ICWA clearly mandates that any foster care placement or termination of parental rights action be invalidated upon a showing by any parent, Indian custodian or the child's Indian tribe that the action violated any provision of §§ 1911-13, which pertain to tribal jurisdiction, parental rights, voluntary termination and, the matter in this case, pending court proceedings.[230] Therefore, the court reversed and remanded the action for a new hearing to allow for thorough compliance with the Act.

222. *Id*. at 34.

223. *See id*.

224. Most notably, the respondent argued, *inter alia*, that since no qualified expert testimony had taken place, a new trial was necessary. *See Elliott*, 554 N.W.2d at 34. § 1912(e) provides that

> [n]o foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, *including testimony of qualified expert witnesses*, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1912(e) (emphasis added). The trial court, because of the phase of the proceeding, rejected this argument. *See Elliott*, 554 N.W. 2d at 34.

225. *See Elliot*, 554 N.W.2d at 33-34. At the time of trial, the child was three and one-half years old. The father was not affiliated with any tribe or band, but the mother was a member of the Sault Ste. Marie Tribe of Chippewa Indians. While the facts were unclear, it appears that the child resided in Kalamazoo County, Michigan, outside the parameters of the mother's tribe. *See id.*

226. *Id*. at 34.

227. *See id*. at 35.

228. 490 U.S. 30 (1989). *See also supra* notes 56-63 and accompanying text.

229. *See Elliott*, 554 N.W.2d at 36-37.

230. *See* 25 U.S.C. § 1914.

The Chippewa Tribe, not to mention all parties in the action, became involved in needless litigation—litigation that could have been avoided had it been discovered at the beginning of the proceeding that ICWA applied. This problem has existed since the Act's inception in 1978 and poses a threat to actions involving guardianship and custody disputes between third parties and the biological Indian parents.

VI. CONCLUSION: THE NEED FOR JUDICIAL ALERTNESS TO POTENTIAL ICWA SITUATIONS

The inappropriate attention courts give ICWA guardianships does not imply that state courts have entirely failed to adhere to ICWA, causing a collapse of the fundamental objectives of the Act. Indeed, it is impossible to monitor the frequency of cases being overlooked involving an Indian child in a guardianship matter. However, this problem to which many courts may be oblivious invites, at the very least, difficulties in isolated circumstances. Familiarization with the Act is the first step toward prevention. Indian populations are continuing to grow. Therefore, there is reason to believe courts will be called upon to apply the Act with greater frequency. Unfortunately, the inadequate attention to which guardianship matters are prone in regard to ICWA demonstrates the overall lack of understanding of the Act.

Congress has clearly called for tribal involvement, specifically the possibility of tribal court jurisdiction and the tribal notice requirement, through the enactment of ICWA. Applying the Act in guardianship proceedings provides a means for this involvement. This involvement can be more easily procured through enactment of state court rules and statutes which direct a person to ICWA and amendments to guardianship or which clearly specify whether a non-custodial parent can receive the child upon demand. Such enactments augment congressional intent, as well as the underlying purpose of the Act itself.

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